

THE ADVISORY JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE AND THE ROLE OF ADVISORY OPINIONS IN THE DEVELOPMENT OF THE EAST AFRICAN COMMUNITY LAW

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ABSTRACT

The East African Community (EAC) Treaty established the East African Court of Justice (EACJ) as the judicial organ of the Community. The EACJ has contentious and advisory jurisdiction. Over its 15 years of existence the Court has only been requested to and delivered two advisory opinions. The first one dealt with the application of the principle of Variable Geometry.

The second advisory opinion addressed the extent to which partner states may be called upon to shoulder the financial responsibility of the Community's employment contracts. It is in this regard that this article aims at analyzing the scope and application of the Advisory jurisdiction of the EACJ and the role of advisory opinions in the development of the EAC law and the EAC integration process. This article discusses the advisory jurisdiction of the Court, the question of locus standi with regard to the advisory jurisdiction of this Court, and examines the preliminary conditions for a legitimate and valid request for advisory opinion.

It eventually discusses the role of the two advisory opinions that have been delivered by this EACJ so far on the development of the EAC law. This article concludes by affirming that the request for advisory opinion permits organs of the Community to review from time to time the difficult and important questions of the EAC law. As stated by the EACJ Appellate Division, the singular significance of the advisory opinion lies in the overarching role that the Treaty has carved out for the EACJ in the overall spectrum of the integration process of the Community.

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The views and opinions expressed in this article are those of the Author and do not reflect the official position of the East African Court of Justice and should not be attributed to the EACJ.

1. INTRODUCTION

The integration of East African Community (EAC) is not a shortcut, but rather a long and winding road full of corners which must be carefully navigated to ensure that the EAC vehicle is not derailed off its tracks.

It is with that hindsight that the framers of the Treaty that established the EAC (Treaty) deemed it necessary to institute an organ designed to settle any dispute that may arise in the implementation process should one Partner State overstep, disregard, or decide to do anything contrary to what is provided for by the Treaty.

The Treaty established the East African Court of Justice (EACJ) as the judicial organ of the Community.² The existence of the EACJ constitutes another forum within the Community for advancing the EAC integration agenda, and this is confirmed by various decisions in the cases that the EACJ has determined so far.³ The Court has jurisdiction over the interpretation and application of the Treaty, provided that the court's jurisdiction to interpret does not include the application of any such interpretation to a jurisdiction conferred by the Treaty on organs of Partner States.⁴ The decisions of the EACJ over Community matters take precedence over national courts. It also has jurisdiction over disputes between the Community and its employees.⁵

It is even clothed with jurisdiction on preliminary ruling matters where the Treaty, in its Article 34, creates a mechanism through which national courts, when faced with a question of interpretation or application of the Treaty, are required to request that the EACJ give a preliminary ruling on the matter, to enable a particular national court before which the question has arisen, to give its judgment on the parent matter.⁶ It can as well hear

² It should be noted that this Court is not the successor of the former East African Court of Appeal ("EAC Court of Appeal") because the EACJ was not set up to overturn verdicts of the Supreme Courts of the EAC Partner States. The EACJ, which became operational in 2001 and temporarily sits in Arusha (Tanzania), differs in both composition and jurisdiction from that of the former EAC Court of Appeal. The EACJ is the highest Court in the EAC in the matters of EAC Law. The EACJ ensures adherence to the law in its interpretation and application of the EAC Treaty, whereas the former EAC Court of Appeal heard decisions of the national courts on both criminal and civil matters, except for constitutional matters and offenses of treason for Tanzania. It is not possible to appeal the decisions of national Courts before the EACJ. However, national courts may refer questions of EAC law to the EAC through preliminary ruling procedure.

³ Anyang Nyong'o and others V Attorney General of Kenya and others, Reference No.1 of 2016(EACJ); Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015)

⁴ See Article 27 of the EAC Treaty

⁵ See Article 31 *ibid.*

⁶ See Article 34 *idem*

requests for advisory opinions submitted by the Summit, the Council, or a Partner State.⁷ Apart from its contentious and advisory jurisdiction, the EACJ is also uniquely entrusted with arbitration jurisdiction.⁸ The actual difference between contentious and advisory jurisdictions is often not very great, and they are of nearly equal importance.⁹

The question of whether the judiciary should serve in an advisory role has been divisive for centuries. For example, in the United States, some Courts' judges declined to give advisory opinions citing their concern with violating the separation-of-powers principle.¹⁰ However, many U.S. states rejected the Court's concern and instead created an advisory role for their judiciaries. Their argument is that when, for example, legislatures solicit judges' opinions on pending legislation, it reduces the number of enacted laws that courts will have to strike down in the future.¹¹

Whatever could be the debate, the fact remains that many international or regional courts are vested with the jurisdiction to issue advisory opinions to their constituencies. In the International Court of Justice (ICJ), the advisory role is one of its core functions. The statute of the ICJ stipulates that its functions consist of adjudicating disputes between member states, and rendering advisory opinions on legal issues submitted to it by international organizations and specialized agencies authorized by the General Assembly to submit questions.¹² In the European Court of Human Rights (ECtHR), Protocol 16 ECtHR provides for an extension of the advisory jurisdiction of this court, enabling the highest national courts to request advisory opinions on questions of principle concerning the interpretation of the European Convention on Human Rights (ECHR) or its protocols.¹³

Before the African Court of Human and Peoples' Rights (ACHPR), despite the fact that access to the Court is limited, in that individuals and NGOs do not have direct access thereto, they can have access to the Court by seeking advisory opinions, as the provision dealing with this aspect is broadly worded.¹⁴ It is also observed that in exercising its advisory opinion powers,

⁷ See Article 36 *Idem*

⁸ See Article 32 *ibid.*

⁹ F. Blaine Sloan, *Advisory jurisdiction of the International Court of Justice*, California Law Review, Vol.38, No.5(Dec.1950), pp830-859

¹⁰ James R. Rogers, George Vanbeg, *Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective*, American Journal of Political Science, Vol. 46, No. 2 (Apr., 2002), pp. 379-397

¹¹ *idem*

¹² I.C.J. STAT. art. 65.

¹³ Protocol No.16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, art.2, Strasbourg, 2.X.2013

¹⁴ AP van der Mei, *The advisory jurisdiction of the African Court on Human and Peoples' Rights*, (2005) 5 African Human Rights Law Journal, at p.27

the ACHPR can be able to address a wide range of human rights issues.

As far as the EACJ is concerned, in over 15 years of its existence, it has only entertained two Advisory opinions. The first Advisory opinion addressed the speed at which some Partner States would sprint on their mutual expedition to the destination of integration known as the principle of variable geometry, and the second advisory opinion addressed the extent to which Partner States may be called upon to shoulder the financial responsibility of the Community's employment contracts.¹⁵

We have become accustomed to thinking of courts only as machinery for handling conflicts between opposing individuals or groups after they have already come into conflict.¹⁶ This article seeks to demonstrate that apart from contentious jurisdiction of the EACJ as a way of dispute settlement, this court can also be accessed by way of advisory opinion. This article analyses the advisory jurisdiction of the EACJ and its limits.

In addition, this article discusses the role that the request for an advisory opinion has on the development of the EAC law, and argues on how the two advisory opinions given so far by this court have played a crucial role by providing clarity, certainty, and the *ratio legis* of certain terms and principles embodied in the Treaty and Staff Rules and Regulations.

In conclusion, this article recommends the utilisation of the request of advisory opinion as one of the avenues to clarify the fundamental and operational principles that govern and guide the destiny of EAC in order to ensure the Community's positive adherence to its law.

2. ADVISORY JURISDICTION OF THE EACJ

In the Advisory Opinion No.1 of 2015 of the EACJ, the court observed that any court of law derives its jurisdiction not from the consensus, nor the admission, nor indeed the consent of the representatives of the parties. Jurisdiction is a function of the constitutive instrument of the particular court. In the case of the jurisdiction of the EACJ, it is the EAC Treaty, of which this court is a constituent part.¹⁷ In *Angella Mudo* case, this court opined the importance of its jurisdiction as follows: "We are also mindful of the fact that in determining its jurisdiction at the threshold, a court must be guided by the relevant law(s), treaties inclusive, and the parties' pleadings, and not by the parties' allegations or assertions of facts from the bar".¹⁸

¹⁵ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [3]

¹⁶ Manley O. Hudson, *Advisory opinion of National and International courts*, Harvard Law Review, Vol.37, No.8(Jun. 194), pp. 970-1001

¹⁷ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [11&12]

¹⁸ Appeal No 4 of 2014 Angella Mudo V. The Secretary General of the East African Community,

Besides, in the African Network Animal Welfare case, the EACJ held that Jurisdiction is a most, if not the most, fundamental issue that a court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case.¹⁹ It observed that the EACJ could not and would not depend solely on a party's concession to derive jurisdiction for this court. This is so because it is trite law, that it is not the parties to a dispute who confer jurisdiction on a court of law. The court must itself derive jurisdiction from its own underlying constitutive law – independently of what views the parties may or may not hold or espouse.²⁰ Therefore, jurisdiction, in any matter coming up before a court, is a fundamental issue that must be resolved *in limine litis*.²¹ Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law puts down its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction.²²

Neither the Treaty nor the EACJ Rules of Procedure provide the definition of an advisory opinion. According to Black's Law Dictionary, an advisory opinion is "a non-binding statement by a court of its interpretation of the law on a matter submitted for that purpose."²³ It is different from a legal opinion, which is a written document in which an attorney provides his or her understanding of the law as applied to assumed facts. The attorney may be a private attorney or an attorney representing the state or the governmental entity. In addition, Webster's Third New International Dictionary also defines advisory opinion as a formal opinion by a judge, a court, or a law officer upon a question of law submitted by a legislative body or a governmental official but not presented in a concrete case at law and having no binding force.²⁴

Article 36 of the Treaty confers jurisdiction on the EACJ to give advisory opinions on questions of law arising from the Treaties. Again, bearing in

judgement, [2015] (EACJ, 2015) [47]

¹⁹ Appeal No 3 of 2011, The Attorney General of the Republic of Tanzania V. African Network Animal Welfare (ANAW), judgement, [2012] (EACJ, 2012) [at p.7]

²⁰ *Idem*

²¹ See Advisory Opinion reference no. 2 of 2013 of the Supreme Court of Kenya, kenyalaw.org/caselaw/cases/view/91815 accessed on January 20, 2017

²² Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd. [1989] KLR 1 (at p. 14)

²³ Black's Law Dictionary, 9th Edition at p. 1201 and p.1202

²⁴ Webster's Third New International dictionary, Vol. 1, (1986), Encyclopedia Britannica, Inc., p. 131.

mind the seriousness of such issues, should advisory opinions be rendered by Court of First Instance, subject to appeal to the Appellate Division or from the Appellate division, whose decisions are final? There is no guidance in the

Treaty on these two issues. The Court has taken the initiative and invoked its rule-making powers under Article 42 of the Treaty by amending the EACJ Rules of Procedure.²⁵ Rule 75 of the Rules of Procedure provides as follows:

“75(1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Division”.

The EACJ observed that for reasons of expedition of the process of giving the opinion, as well as for reasons of maximizing the clarity and finality of the Court’s opinion on the state of the Community law generally, the exercise of the Court’s advisory function has since 2013 been transferred from the First Instance Division (where all References to the Court originate), to the Appellate Division (where appeals are entertained and adjudicated with finality).²⁶ In my view, the rationale of this provision was also to avoid having advisory opinions be subject to appeal where the decision of the appellate division is final. This may be a stop-gap measure, and proper jurisdictional boundaries need to be made in the Treaty itself.²⁷

It is worth mentioning that the first request for an Advisory Opinion that was brought before this court was heard by the First Instance Division, and the second request was heard by the Appellate Division. When a court is seized by a request for an advisory opinion, it must first consider whether it has jurisdiction to give the advisory opinion requested and whether the answer should be in the affirmative, or if there is any reason why it should decline to exercise its jurisdiction.²⁸ This means that the court addresses whether it possesses jurisdiction to give the advisory opinion requested. In its advisory opinion No. 1 of 2015, the Court was clear as to preliminary conditions for the Court to give a legitimate advisory opinion. It has been observed by the Judges of the EACJ that an advisory opinion carries the

²⁵ Justice Harold R. NSEKELA, *Overview of the East African Court of Justice*, A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011

²⁶ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [13]

²⁷ Justice Harold R. NSEKELA, *Overview of the East African Court of Justice*, A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011

²⁸ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015)

insignia and imprimatur of judgement²⁹ as stipulated in rule 75(7) read together with rule 68(4) and (5) of the Rule of the EACJ (2013). The Court observed that it needs to be satisfied that the following conditions are met:

a) Jurisdiction *ratione personae* or *locus standi*

The court needs to be satisfied of its jurisdiction *ratione personae*, and that is to say that the request for the advisory opinion has been made by a person or entity as the applicant having proper *locus standi*. In this regard, the request for an advisory opinion has to be made by either the Summit, the Council of Ministers, or a Partner State, which are the only entities under the EAC Treaty that are specifically and expressly entitled and authorized to do so under Article 36 (1) of the Treaty. This provision raises the question as to why the framers of the Treaty did not authorize other organs of the EAC, such as the East African Legislative Assembly (EALA) and the Secretariat, to make a request for an advisory opinion.

It is arguable that the Secretariat was not entitled and authorized to make a request for an advisory opinion because it is not considered a decision-making organ of the EAC per se according to Article 71 of the Treaty related to functions of the EAC Secretariat. It appears that the major role of the Secretariat is the co-ordination and harmonisation of the policies and strategies relating to the development of the community. In my view, this means that if the Secretariat of the EAC wanted to make a request for an advisory opinion, it would do so through the Council of Ministers, and that may explain the reason why it was even given the right to be represented and to take part in the proceedings for the Advisory Opinion. The situation is similar to the United Nations, where, in addition to principal organs, such as the Security Council and General Assembly, the Secretary General may indirectly seek an advisory opinion of the International Court of Justice (ICJ) through the General Assembly or another authorized organ.

With regard to EALA, one could question the rationale behind the fact of not being entitled to request an advisory opinion from the EACJ. In other jurisdictions, the parliament is authorized to make a request for an advisory opinion on questions of law that may arise on pending legislation³⁰. Before the

²⁹ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [14]

³⁰ See Article 163(6) of the Constitution of Kenya of 2010. Article 163(6) of the Constitution of Kenya of 2010 stipulates that the Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning a county government. This is also the case in India as explained by Oliver P. Field in his article "The Advisory Opinion: An Analysis" at p. 205 that "Advisory Opinions are given on pending [legislation] or contemplated action by the Executive, while decisions are on Acts

ICJ, in addition to the principal organs, for example the interim committee of the General Assembly, a subsidiary organ established under Article 22 of the Charter³¹ of United Nations is authorised by the resolution re-establishing it to request an advisory opinion,³² and nine specialised agencies of the UN have received authorisation by means of articles in the agreements concluded between each organisation and United Nations.³³

It is my opinion, based on what is done in other jurisdictions as elucidated above, that authorising the EALA to make a request for an advisory opinion on pending legislation would pose no problem without prejudice in respect to the principle of separation of powers and consideration of the application of the political question doctrine. Instead, this would be the occasion for EALA to take precaution when the subject of a bill being discussed is of great importance which merits an EACJ advisory opinion. In this regard, the advisory opinion would play a role of complementarity of the organs of the EAC without hampering the principle of separation of powers and without interfering in the internal affairs of the Assembly. The Supreme Court of Kenya also observed that advisory opinions are applicable to early stages of legislation or at the executive's law-making policy stage, but not after statutory status has been realised.³⁴ Thus, it is the role of the EACJ to signal direction of the adherence and compliance by the Partner States with regard to the interpretation and application of the Treaty and related protocols. This line of reasoning is supported by the fact that in a constitutional democracy it is the court, not the parliament, that determines the lawfulness of actions of bodies, including the parliament.³⁵ It presumes that separation of powers is successful only when the departments are working in harmony towards a common end.³⁶ Thus, the real state of things is that all organs of the EAC

passed or actions taken earlier, sometimes much earlier". He further clarifies the situation and circumstances under which such request should be made as follows: "...the determining factor is that the Advisory Opinion is conceived to be Advisory in the process of making statutes rather than as a device adoptable to the settlement of rights affected by enacted statutes". Besides, he stated that advisory opinion practice even at its best is a supplement to, not a substitute for, judicial review."

³¹ See Article 22 of the UN Charter

³² F. Blaine Sloan, *Advisory opinion of the International Court of Justice*, California Law Review, Vol. 38, No. 5 (Dec. 1950), pp 830-859;

³³ General Assembly Resolutions 196 (III), 3 December 1948; and 295 (IV), 21 November 1949.

³⁴ See Advisory Opinion reference no. 2 of 2013 of the Supreme Court of Kenya, kenyalaw.org/caselaw/cases/view/91815 at par.47, accessed on February 26, 2017

³⁵ *Idem* at par.56

³⁶ Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, Roger Williams University Law Review, vol.2, 1997, pp 207-256

work towards a common end, which is the furtherance of the EAC objectives and principles.

It is important to note that the question of who has *locus standi* to request an advisory opinion of the EACJ has extensively been discussed before the EACJ in the case of Legal Brains Trust (LBT) Ltd v. The Attorney General of Uganda³⁷, where the court held that legal and natural persons are excluded from requesting an advisory opinion from the EACJ. The incapacity of a legal person to seek an advisory opinion before this court was clarified in that case where the request was rejected because the applicant lacked *locus standi* under Article 36 of the Treaty. The reference filed by Legal Brains Trust (LBT) sought the interpretation of Article 51 (1) of the Treaty, which provides that:

“1. Subject to this Article, an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years.” In this case the Appellate Division declined to adjudicate the matter, for the appellant had no *locus standi*.³⁸

b) Jurisdiction *ratione materiae*

Concerning the jurisdiction *ratione materiae*, the subject matter of the advisory opinion prescribed under the same Article 36 (1) of the Treaty requires the requested opinion to be one: “regarding a question of law arising from the EAC Treaty which affects the Community.” The question of what may be asked as an advisory opinion is very crucial to avoid the Court’s abuse of process. Is it on any legal question, or only a legal question arising from the Treaty? What about the legal question arising from the protocol which forms an integral part of the Treaty; namely the Customs Union, the Common Market Protocol, and the Monetary Union protocol?³⁹ In my view, the EACJ may only give an advisory opinion on a question of law arising from the EAC Treaty and the protocols thereto.⁴⁰

³⁷ Appeal No 4 of 2012 Legal Brains Trust (LBT) Ltd V. The Attorney General of Uganda, judgement [2012

] (EACJ, 2012) [14]

³⁸ Following the conflicting interpretations of Article 51 (1) of the Treaty Establishing the East African Community, the Rt. Honorable the Speaker of the Parliament of Uganda wrote a letter requesting that the Attorney General of the Republic of Uganda seek an advisory opinion from the East African Court of Justice pursuant to Article 36 of the EAC Treaty. The Attorney General did not seek the requested advisory opinion. Instead, he responded with a written legal opinion of his own on the matter -to the effect that Article 51 (1) prescribes a limit of two terms of 5 years each for every elected Member of the East African Legislative Assembly (“EALA”). Thereupon, somehow the Applicant “Legal Brains Trust (LBT) surfaced as an “aggrieved” party, and lodged a “Reference” in the First Instance Division of the EACJ, seeking that Court’s interpretation of Article 51 (1) of the Treaty. Aggrieved by the judgment of the First Instance Division, the Appellant lodged an appeal to the Appellate Division of the EACJ.

³⁹ See Article 151(4) of the EAC Treaty

⁴⁰ Article 151(4) of the EAC Treaty stipulates that “*The Annexes and Protocols to this Treaty*

Like contentious jurisdiction, the advisory jurisdiction of the EACJ is limited, as it has to be, not only on a question of law arising from the Treaty, but also it must be a question that affects the Community. These elements appear to be cumulative conditions that must be fulfilled for the Court to give its advisory opinion. A similar limitation can also be found in the ECtHR as this court may only give advisory opinions on “legal questions concerning the interpretation of the European Convention and the protocols thereto”.⁴¹

It is arguable that this limited jurisdiction may be one of the reasons why only a handful of advisory cases have been brought before the EACJ, unlike for example, the ICJ, which has seen an increased number of its advisory cases. The ICJ may give an advisory opinion “on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the U.N. to make such a request.”⁴² Similarly, the ACHPR also has broad advisory jurisdiction power. Its Protocol states that the ACHPR may render advisory opinions on “any legal matter relating to the Charter or any other relevant human rights instrument, provided the subject matter of the opinion is not related to a matter being examined by the African Commission”.⁴³ Thus, the substantive scope of the Court’s advisory jurisdiction is much broader than that of the African Commission’s interpretative power, which is restricted to the African Charter.⁴⁴ In the Inter-American Court of Human Rights (IACHR), unlike its contentious jurisdiction, its advisory jurisdiction can be utilized without additional state consent, and the opinions are not binding.⁴⁵ The ECOWAS Court gives legal advisory opinions on any matter that requires interpretation of the Community text.⁴⁶

Before the EACJ, as it has been observed by this court, the organ requesting an opinion should refrain from asking questions of facts or purely academic or hypothetical questions not relating to a question of law arising from the Treaty and which affects the Community. This also means that the court cannot entertain a political question (though it is very difficult to separate legal questions from political questions, because political and legal questions

shall form an integral part of this Treaty”.

⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 47, Nov. 4, 1950, 213 U.N.T.S. 221.

⁴² Statute of the International Court of Justice art. 65, June 26, 1945, 59 Stat. 1031

⁴³ Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, art. 4, OAU Doc.OAU/LEG/EXP/AFCHPR/ PROT (111) (June 9, 1988),

⁴⁴ AP van der Mei, *The advisory jurisdiction of the African Court on Human and Peoples’ Rights*, available at reference.sabinet.co.za/document/EJC52018 (accessed on March 2, 2017)

⁴⁵ Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT’L L. 246 (2002)

⁴⁶ Protocol A/P.L/7/91 on the community court of justice, article 10

are very closely intertwined). Thus, for the matter to be brought before the EACJ

seeking for an advisory opinion there should be an underlying factual situation capable of giving rise to any real dispute.⁴⁷ Again, in the case of *Legal Brains Trust (LBT) Ltd v The Attorney General of Uganda*, the EACJ held that it is a cardinal doctrine of this court's jurisprudence that a court of law will not adjudicate hypothetical questions where no real, live dispute exists.

A court will not hear a case in the abstract, or one which is purely academic or speculative in nature about which there exists no underlying facts in contention.⁴⁸ The judgements went on to say that the reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts.⁴⁹ In that judgement the court held that there must be pre-existing facts arising from a real life situation that gives rise to, for instance, a breach of contract, a tortious wrong, or other such grievances on the part of one party against another. Absent such a dispute, the resulting exercise would be but an abuse of the court's process.

Again, in the *Legal Brains (LBT) case*, the EACJ observed that in the case of *C.D. Olale v. G. O. Ekwelendu* (1989) LPELER-SC, 54/1988, the Supreme Court of Nigeria held as follows: "The issue formulated by the appellant set out above is a hypothetical question and has not been given a nexus with the matters in the instant appeal. This Court has on several occasions declared and emphasized that the 1974 Constitution which established it has not conferred on it jurisdiction to deal with hypothetical, academic, or political questions. So the Supreme Court does not deal with or determine hypothetical questions and will not, in this judgment, answer the question posed in the issue for determination."⁵⁰

To sum it up, when determining whether or not to exercise the jurisdiction of providing an advisory opinion, Article 36(1) provides for three *sine qua non* elements that the court needs to be satisfied, namely:

- Is it a question of law which requires solution by the Court?
- Does it arise from the Treaty? and
- Does it affect the Community?

From the above analysis, it is clear that the EACJ is not empowered to

⁴⁷ Appeal No. 4 of 2012 *Legal Brains Trust (LBT) Ltd. V. The Attorney General of Uganda*, Judgment [2012] (EACJ, 2012) [25]

⁴⁸ *Legal Brains Trust (LBT) Ltd* [19]

⁴⁹ *ibidem*

⁵⁰ *Legal Brains Trust (LBT) Ltd* [20(3)]

deal with every legal question arising from the Treaty; rather, its advisory jurisdiction is limited to a question of law arising from the Treaty which affects the Community.

On the question of whether the court can give an advisory opinion on the Acts of the East African Legislative Assembly (EALA) or Council Directives, in my opinion the Treaty stipulates only to the question of law arising from the Treaty, not the question of law arising from the Acts or from Council Directives. The Treaty is silent about the question of law that may arise from Acts or Council Directives which affect the Community, and it is arguable whether the doctrine of absurdity⁵¹ can be applied in this context. Therefore, it should be made clearer as to whether a question of law that arises from Acts of EALA or Council Directives does not fall under the category where an advisory opinion could be sought.

What if, for example, member states face challenges on the application of certain provisions of an Act or Council Directive and want to seek an advisory opinion from the Court? For example, the EAC One Stop Border Post Act, 2013, The East African Community Supplementary Appropriation Act, 2012, The East African Community Vehicle Load Act, 2013. It would be absurd not to have an organ that could handle a question of law that may arise from one of the provisions of these Acts as far as advisory opinion is concerned. It is my view that Partner States may not deem it appropriate to go for contentious procedure, but rather may want to request an advisory opinion to seek the clarity of one of the articles of an Act of the EALA or a Council Directive. In this context, I would recommend to the framers of the Treaty to also extend requests for an advisory opinion to a question of law arising from Acts and Council Directives as well. Thus, this would bring end to the imbroglio caused by Article 36 of the Treaty as to whether parties may seek an advisory opinion on a question of law arising from an Act of EALA or Council Directives which is not in compliance with the Treaty and which affects the Community.

c) The rights to be represented

With regards to the right to be represented and to take part in the proceedings for the advisory opinion before the EACJ, the procedure prescribed under Article 36(1) of the Treaty and Rules 75(2), (4) and (5) confer on the Partner State directly concerned, as well as on all other Partner States, and

⁵¹ In law, strictly literal interpretations of statutes can lead to seemingly absurd results. The Doctrine of Absurdity holds that commonsense interpretations should be preferred in such cases, rather than literal readings. For example, under the [Absurdity Doctrine](#), American courts have interpreted statutes contrary to their plain meaning in order to avoid absurd legal conclusions. See https://en.wikipedia.org/wiki/plain_meaning_rule

the Secretary General of the Community, the right to be represented and to take part in the proceedings for the Advisory Opinion. Again, The Registrar of the Court has to notify all the Partner States and the Secretary General of the Community that a Request for an advisory opinion has been instituted; and that they have a right to be represented in the proceedings, as well as to submit their views.

The Court (the Appellate Division) may identify any person likely to furnish information on the question and shall direct the Registrar to give notice of the request to such person.⁵² This is in the discretion of the court, which means that it is up to the judges to design anyone the court feels has relevant expertise in the area of the request for an advisory opinion at their disposal. This discretionary power is also in line with the inherent power provided for in the Rules of Procedure (2013).⁵³ In its advisory case Application No. 1 of 2008, the East African Law Society (EALS) requested to appear as *amicus curiae*.⁵⁴ There was no opposition by the Counsel to the community, or by the Partner States represented at that session, to the EALS's request, and the court granted it. It is important to note that advisory opinion procedures are flexible and offer a wider participation of parties in the proceedings. The tendency to handle advisory opinion requests in the same manner as regular cases, so far as internal court procedure is concerned is natural, and does not conclusively show whether in essence the adjudication work is judicial or advisory.⁵⁵

d) Formulation of the question requesting an advisory opinion

Article 36 (2) of the EAC Treaty requires the request to be formulated as “an exact statement of the question upon which an opinion is required”. Moreover, the statement must be “accompanied by all relevant documents likely to be of assistance to the Court.”⁵⁶

It is in that context that the court must be satisfied that the statement formulated constitutes an exact statement – in its terms, its context, and its reach. The question should be with no ambiguity in its formulation, no

⁵² See Rule 75(3) Of the EACJ Rules of Procedure (2013), available at http://eacj.org/?page_id=2414

⁵³ See rule 1(2) of the Court's Rule “Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

⁵⁴ With regard to Amicus Curiae, see Rule 36 of the EACJ Court's Rules of Procedure, available at http://eacj.org/?page_id=2414

⁵⁵ Olivier P. Field, *idem*

⁵⁶ 75(1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Division”

uncertainty in its meaning, no vagueness in its content, and no ambivalence in its intent. In addition, the statement should be both precise and concise. Moreover, the request as required by Article 36 (2) of the Treaty, should be accompanied by relevant documents (such as Annexures and case authorities) offering useful explanations to the various aspects of the requested advisory opinion.

The Court ought to decline to provide an opinion where it does not have before it sufficient factual material to enable it to form an opinion, or where it is in danger of giving an incomplete answer that can be misconstrued.⁵⁷ It has been recognised that even when the court has jurisdiction to render an advisory opinion, it is not compelled to do so. It lies within the court's discretion whether or not it will give an opinion asked of it.⁵⁸ The court is permitted to reformulate the question raised in the request if it considers it confusing or not precise enough. Such an initiative is properly not feasible within the contentious jurisdiction of the court, which is largely dependent on the free will of the parties. The difference between "a question" and "a dispute" upon which an advisory opinion might be given is of utmost importance, and in my view, this means that a request for an advisory opinion cannot be given on a dispute. According to Black's Law Dictionary,⁵⁹ a dispute is a conflict or controversy, especially one that has given rise to a particular lawsuit. Thus, there must be a question of law concerning the community that causes a dilemma and that deserves an opinion of the EACJ in order to get out of the conundrum. As mentioned above, the court may reformulate the question if it deems it necessary because it is not well-framed, and a provision of sub-rules (4) and (5) of Rule 68⁶⁰ of the Rules of the Court shall apply to advisory opinions *mutatis mutandis*. This means that one advisory opinion shall be given as the advisory opinion of the court and shall be signed by the judges who participated in it. But in case a judge should dissent, he should not be required to sign the advisory opinion, and may, in his discretion, write a dissenting advisory opinion. It is a common trend to find dissenting advisory opinion in various Courts,⁶¹ but there is none in the EACJ so far.

⁵⁷ Dapo Akande, *The competence of International Organizations and the advisory jurisdiction of the International Court of Justice*, European Journal of International Law (1998), pp. 437-467 ⁵⁸ Idem

⁵⁹ Black's Law Dictionary, 9th Edition, at 540

⁶⁰ See Rule 68 (4) and (5) of the EACJ Rules of Procedure, available at http://eacj.org/?page_id=2414

⁶¹ See ICJ Advisory opinions and The Supreme Court of Kenya Advisory Opinion; Also see Stephen M. Schwebel, Widening the Advisory Jurisdiction of the International Court of Justice without Amending Its Statute, Catholic University Law Review, Vol.33, 1984, pp 355-361; F. R. AuMANN, The Supreme Court and the Advisory Opinion, Ohio State Law Journal: Volume 4, Issue 1 (1937), pp. 21-55, available at <http://hdl.handle.net/1811/72201>, accessed on February 15, 2017.

3. IS THE ADVISORY OPINION OF THE EACJ OF A BINDING NATURE?

In its advisory opinion No. 1 of 2015, the EACJ observed that “an Advisory Opinion carries the insignia and imprimatur of a “Judgment” of this Court – per Rule 75 (7), read with Rule 68 (4) and (5) of the Court’s Rules of Procedure.”⁶² What did the judges of the Court mean when they stated that an advisory opinion carries the insignia and imprimatur of a judgement of this court? What weight does the EACJ give to advisory opinions? Do its advisory opinions have binding force like a contentious judgement?

Advisory opinions generally lack the legally binding force of judgments in contentious cases, and for this reason they may carry less weight than judgments.⁶³ However, they may have alternative or additional value. Firstly, in advisory cases, courts are not bound by the specific facts or legal details of the dispute under consideration. This enables them, more than in contentious cases, to clarify or to establish general legal principles or rules that impact upon many more States or other actors than the few parties in a contentious case. Secondly, advisory proceedings are less confrontational than contentious proceedings. States or Member States are not placed in the position of the ‘accused’.⁶⁴ It is also true that advisory opinions are not binding, but through these opinions, the court indicates to the parties in question the proper behaviour to adopt in order to comply with the law, though it does not make it compulsory to do so. In advisory opinions therefore, the court states what the law is, and does not impose it on the parties. It informs the actors of their legal obligations and does not sanction them for having infringed these obligations.⁶⁵

It is worth mentioning that the non binding effect of these opinions does not mean that they are without legal effect. This is because the legal reasoning embodied in them reflects the court’s authoritative views on important issues of the law, and in arriving at them, the court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it. Advisory opinions, though issued in the absence of controversy, are also neither binding nor do they carry precedential value. They are sometimes only offered as persuasive evidence in cases where no precedent exists. A very sound example is the *Nuclear Tests Advisory Opinion* in the ICJ that has been used in different cases to

⁶² See Rule 75 and 68 of the EACJ Rules of Procedure (2013), available at http://eacj.org/?page_id=2414

⁶³ Ap Van Der Mei, *The advisory Jurisdiction of the African Court Human and People’s Rights*, African Human Rights Law Journal, 2005, pp 27-46

⁶⁴ idem

⁶⁵ idem

determine unilateral acceptance.⁶⁶ The ICJ observed that a threat or use of force by means of nuclear weapons that is contrary to Article 2, Paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful. Additionally, it opined that a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.⁶⁷ This court also observed in that Advisory Opinion that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

In international law, in theory, advisory opinions are authoritative but usually non binding statements or interpretations of international law by an international tribunal or arbitral body.⁶⁸ Since advisory opinions do not bind States, international bodies can issue opinions relating to a State's internal affairs without obtaining that State's consent. They are also in theory less confrontational than contentious cases because states are not parties and do not have to defend themselves against formal charges.⁶⁹ Thus, advisory opinions are said to be "soft" law because they are not binding, and because of the absence of a binding legal obligation, advisory opinions must encourage, but not compel, states or organs to behave in a certain manner.⁷⁰

One could ask if an advisory opinion may have a *res judicata* as is the case for a judgement of the court, or if the concept of *res judicata* is applicable to an advisory opinion. Logically, after giving an advisory opinion, if there is an attempt to bring an identical question to court by way of application for judgement, the court would probably be in a position to entertain the case, but from a practical viewpoint its judgement in all likelihood would be exactly the same as its advisory opinion. It is true, however, that this might depend on the extent to which there were full hearing of the issues

⁶⁶ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226; available on <http://www.icj-cij.org>

⁶⁷ see International Court of Justice: *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 809 (1996)

⁶⁸ Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30)

⁶⁹ Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 246 (2002); also see Charles M. Carberry, *The State Advisory Opinion in Perspective*, Fordham Law Review, Vol.44, 1975, pp. 81-113

⁷⁰ Julie C. SCHMID, *Advisory opinions on human rights: moving beyond a pyrrhic victory*, 16 Duke Journal of Comparative & International Law 415-456 (2006), pp. 415-455

in the advisory opinion. Thus, the finality of the advisory opinion is not

necessarily different from the finality of a judgement. In a number of other cases in which advisory opinions are given, the concept of *res judicata* is not applicable, since there are no parties even by analogy.⁷¹

When the EACJ observed that “an Advisory Opinion carries the insignia and imprimatur of a “judgment” of this Court, does it mean that its advisory opinion can be enforceable under Article 38(3) of the Treaty? Article 38(3) of the Treaty provides that “A Partner State or the Council shall take, without delay, the measure required to implement a judgement of the Court”⁷² (meaning a judgement of the EACJ). While the Treaty remains silent as to the legal effect or binding of an advisory opinion, my view is that an advisory opinion has the same legal effect as a judgement, with exception of its binding nature and enforcement. Thus, answering a question would be tantamount to deciding a dispute. While in the formal sense it may be true that an advisory opinion does not have the binding force of a judgment, practically, it does, as an authoritative statement of law, have almost the same legal effect.

4. THE ROLE OF THE ADVISORY OPINION IN THE DEVELOPMENT OF THE EAC LAW

The EACJ is a very important organ in the integration process of EAC as it plays a pivotal role not only through peaceful settlement of disputes, but more importantly, by contributing to the harmonization of the laws of Partner States and the development of jurisprudence in the region.⁷³

The purpose of seeking an advisory opinion is to enable the community, its organs and institutions, and the Partner States get a clear interpretation of the Treaty on matters that are contentious or not clear.⁷⁴ It is to give advice and guidance to the requesting organs or bodies.⁷⁵ Advisory Opinions offer a court a much greater potential to develop the law than do judgments in contentious proceedings.⁷⁶

⁷¹ F. Blaine Sloan, *Advisory Jurisdiction of the International Court of Justice*, *California Law Review*, Vol.38, pp. 830-859;

⁷² See Article 38(3) of the EAC Treaty.

⁷³ Prof. John Eudes Ruhangisa (PhD), *A Key Note address to the second LEAC Conference on East African Integration through law*, organized by Leiden University in Collaboration with the East African Court of Justice, at EAC Headquarters, Arusha, Tanzania 5th May, 2016

⁷⁴ See Application No 1 of 2008 Request for Advisory opinion (before the EACJ)

⁷⁵ James L. Kateka, *Advisory Proceedings before the Seabed Disputes Chamber and before the ITLOS as a Full Court*, *Max Planck Yearbook of United Nations Law*, Volume 17, 2013, p. 159-171.⁷⁶ M. Lachs, “Some Reflections on the Contribution of the ICJ to the Development of International Law”, *Syracuse Journal of International Law and Commerce* 10 (1983), 239 et seq. (249).

Advisory opinions are vital for the EACJ to develop some principles of the EAC law. This was the case when this court addressed the question of the principle

of variable geometry and its application in the implementation of the community policies and programs. In this regard, for example, the Advisory Opinion on the application of the principle of variable geometry⁷⁷ is of great importance as it guides the process of decision-making, which is critical to the institutional development of the EAC, and also contributes to the development of the regional jurisprudence. In its Advisory Opinion, the court opined that the principle of variable geometry is in harmony with the requirement for consensus in decision-making if applied appropriately. The court observed that consensus as applied in the Treaty and Protocols is purely and simply a decision-making mechanism in the Summit, the Council, and in the other executive organs of the community, while variable geometry as used therein is a strategy for implementation.⁷⁸ The court clarified that variable geometry is intended, and actually allows those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time, or simply at a different speed, while at the same time allowing those who are able to implement it immediately to do so.⁷⁹ This Court also brought clarity to whether the requirement of consensus in decision-making implies unanimity of the Partner States as follows:

“it is our considered opinion, from the above discourse, that consensus

⁷⁷ The principle of variable geometry is defined in Article 1 of the Treaty to mean ‘... the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds’. The request arose against the background of the then ongoing common market negotiations in the East African Community (EAC). The negotiations made it clear that the EAC Partner States were not in agreement on what common market commitments they were willing to make, both as a community and as individual members of the community. Tanzania, for example, objected to opening up land ownership to other East Africans fearing that it would upset its policy against landlessness by allowing residents of other countries to buy land. Tanzania also proposed that each member country in the

common market should retain its own labour laws and further limited the adoption of the right to residence which confers automatic right to work anywhere in the EAC. Lack of agreement on the details on the common market negotiations meant that the Council of Ministers and the Summit could delay the negotiations until consensus was reached, or they could agree to proceed in a manner that accommodated the differences. Consequently, the Council of Ministers directed the EAC Secretariat to seek an advisory opinion on the application of the principle of variable geometry because, according to it, interpreting variable geometry as permitting progression of the different activities, projects, and programmes at different speeds was ‘contestable on the

basis of the fundamental requirement under the Treaty and relevant annexes for consensus as a basis for decision-making by the Heads of State and the Council of Ministers

⁷⁸ Application No.1 of 2008 A Request by the Council of Ministers of the East African Community for an Advisory Opinion-before the EACJ [2009] (EACJ, 2009), p. 29

⁷⁹ Id. p. 34

does not mean unanimity, either from ordinary English meanings or from legal dictionaries, and it does not imply unanimity when used in the Treaty, the Protocol on Decision Making, or the Rules of Procedure of the various organs. They are two different concepts.” The court is of the opinion that the cure for the defect does not lie in equating consensus, out of the blue, with unanimity; rather, it lies in amending the relevant instruments.⁸⁰ In that regard, the advisory opinion of the court brought clarity as to the flexibility in the process of implementing projects and programmes in the integration process, and the possible progression of the activities in co-operation by some of the partner States, as opposed to all Partner States simultaneously. That advisory opinion on the principle of variable geometry is considered a critical turning point in fast-tracking regional economic and political integration, and would create room for phased integration.

Advisory Opinions play a major role in the harmonisation of the EAC Law, because it removes the fog from face of the law, and brings clarity to the EAC Laws. It is the most important tool available in the armoury of the court to fulfill its solemn duty under the Treaty.⁸¹ It aims to ensure the Community’s positive adherence to its law.⁸² It is also a preventive tool to stay the hand of would-be violators and contravenors of the Treaty, and to deter violation of the community law. In this regard, for example, in the advisory opinion No 1 of 2015, the request sought an opinion as to whether or not the words “forfeit” and “withdraw”, appearing respectively in Article 67 (2) of the Treaty and Rule 96 (3) of the Staff Rules, do, in effect, amount to the same thing. The court observed that forfeiture of the position of a Deputy Secretary General, pursuant to Article 67(2) of the Treaty, is a function and consequence imposed by the automatic operation of the law, without the free will or choice of the Partner State concerned; whereas the withdrawal of Deputy Secretaries General from their position by a Partner State, for purposes of making way for an in-coming Secretary General of the same Partner State, though contemplated under Rule 96(3) of the Staff Rules and Regulations, 2006 of the Community, would in its application be a function and a consequence of the free will and choice of the particular Partner State involved. The EACJ, in that advisory opinion, opined that the function would offend and would clearly be inconsistent with and contrary to the objectives and purpose of the Treaty, in particular concerning the principle of rotation in Article 67(1) and (2) of the Treaty. The court pointed out inconsistency between the Treaty and the Staff Rules, which are made pursuant to the

⁸⁰ Id. p. 37

⁸¹ Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [100]

⁸² Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [100]

provisions of Articles 14(3) (g) and 70(3) of the same Treaty, and therefore, the Staff Rules must, to the extent of the inconsistency, yield to the primacy of the provisions of the Treaty. With regard to the 'practice' whereby two Partner States have in the past refunded to the Secretariat of the community the compensation paid to two former Deputy Secretaries General of their nationality for premature termination of their tenure (in order to give way to the in-coming Secretaries General of the same nationality), the EACJ observed that that practice has not as yet sufficiently developed to trigger objective recognition under international law as an " established State practice". It is, at best, only a developing practice.

At worst, any emerging "practice" from the past two precedents of Uganda and Tanzania has been fatally wounded and may well be on its way to becoming inchoate, if not, comatose.⁸³ The court underscored that of the three precedents signifying the alleged "practice", the first (Uganda's) was effected prior to the 2006 Staff Rules and, therefore, lacked any legal basis at all; the third (Rwanda's) has been plainly challenged and openly disputed by the Partner State concerned. That leaves only the second (Tanzania's) as the lone "practice." Accordingly, the court said that there is no legitimate basis to hold this as a valid "practice" of the Partner States of the EAC. It is quite evident that this so-called "practice" cannot be taken into account for purposes of interpreting or applying Article 67(2) of the Treaty, and Rule 96(3) of the EAC Staff Rules and Regulations.⁸⁴ Therefore, the EACJ advised that, to avoid the latent friction between Article 67(2) of the Treaty and Rule 96(3) of the Staff Rules and Regulations, the two need formal, adequate, and appropriate harmonization by the competent organs and authorities of the Community. Thus, the EACJ opined that the Republic of Rwanda was under no legal obligation to refund the compensation that was paid in 2011 by the Secretariat of the community to the outgoing Deputy Secretary General. As result, the lesson learned from this Advisory Opinion, which is very important to the Community, is that there is contradiction between the Treaty and Staff Rules and Regulations that needs to be addressed, and that there is also a big challenge of having political appointees being governed by the same Staff Rules and Regulations together with the professional staff.

Similarly, the importance of the advisory opinion has also been emphasized by the Supreme Court of Kenya as follow: "The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great

⁸³ Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [102(4)]

⁸⁴ Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015) [102(5)]

public importance which may not be suitable for conventional mechanisms of justiciability.”⁸⁵

An advisory opinion is advantageous, and one clear advantage lies in its procedures which are flexible. It allows a wide participation in the proceeding, and participants take such contribution seriously. As far as the EACJ is concerned, all the Partner States, the Secretary General, and any other person considered by the court likely to furnish information on the question before it are invited to take part in the proceedings.⁸⁶

The importance of the Advisory Opinion lies in the overarching role that the Treaty has carved out for the EACJ in the overall spectrum of the integration process of the community. The court’s primary and cardinal role is to ensure that the Partner States, the Community, its organs, and its institutions, all adhere to the law in the course of their expedition to the destiny of Integration.

In this role, the instrument of the advisory opinion is easily the most potent tool available in the armoury of the court to fulfil its solemn duty under the Treaty.⁸⁷ Generally, another significant feature of the use of the advisory instrument is its timeliness; the procedure has been a traditional tool for government in procuring a ruling on the constitutionality of legislative action without the delay that comes with litigation through normal channels.⁸⁸ This has also been confirmed by Strayer, who stated that the advisory system speeds up the process where time is of the essence.⁸⁹ Peter Bogg concurred with Strayer and opined that the advisory system is a desirable vehicle, because it enables constitutional issues to be presented to the court more quickly and more precisely than awaiting the vagaries of litigation to bring the issue forward.⁹⁰ I concur with them by submitting that, in the same vein, the advisory system before the EACJ would speed up the process of

⁸⁵ See Advisory opinion on the matter of the principle of gender representation in the national assembly and the Senate [2012] eKLR, Advisory Opinion no. 2 of 2012, par.19, Kenyan Supreme Court

⁸⁶ Nina Sokoine, *EACJ gives two advisory opinions in its approximately 15 years of existence*, EACJ Magazine, January-December 2015

⁸⁷ See Advisory Opinion No.1 of 2015 A Request by the Council of Ministers of the East African Community for an Advisory Opinion [2015] (EACJ, 2015)

⁸⁸ Katherine E. Swinton, *The Supreme Court and Canadian Federalism*, (Carswell, Toronto, 1990), p. 11.

⁸⁹ B.L. Strayer, *The Canadian Constitution and the Courts*, (Butterworths, Toronto, 3rd edition., 1988) p. 323.

⁹⁰ Radhakrishnan Persa, *The role of judicial advisory opinions in Canadian constitutionalism and federalism: the senate, patriation & quebec veto reference cases considered*, Thesis, Queen’s University, Kingston, Ontario, Canada, 1998, pp. 42-43

bringing clarity and certainty to principles and provisions of the Treaty and protocols thereto, and thus would contribute to the development of the EAC Law.

5. CONCLUSION

The EACJ is the apex court of the EAC to give authoritative and final interpretation of the Treaty and its related protocols. With the amendment of the EACJ's Rules of Procedure in 2013, the jurisdiction to entertain requests for Advisory Opinions was transferred from the Court's First Instance Division, and was conferred, instead, on the Appellate Division of the Court – as the final arbiter of disputes involving the community and the Treaty. The Court's advisory opinion brings certainty to certain provisions of the Treaty that seem to be vague and need clarity in their application and implementation. The EACJ's Advisory opinion would bring positive effect upon the furtherance of the EAC integration, as it would bring more clarity.

The EACJ should bear responsibility for directing the path of the EAC integration agenda, and has a big task to develop the jurisprudence of the region as far as Community law is concerned, which would smooth the journey of the integration process to the ultimate goal of political federation as it is envisaged by the pillars of the EAC integration. Considering matters of great importance in the regional integration which call for expeditious resolution, an advisory opinion appears to be the best recourse.

As transpired in both of its advisory opinions, the EACJ, like other courts, recognises that its advisory opinion is an important avenue for settling matters of great importance which may not be suitable for the conventional mechanism of justiciability. Advisory opinions offer a court a much greater potential to develop the community law than do judgements in contentious proceedings. It is worth mentioning that judgements and advisory opinions are regarded as of equally importance in the jurisprudence of the EACJ, though the latter are not binding. I would recommend to the framers of the Treaty to also extend requests for an advisory opinion to a question of law arising from Acts and Council Directives as well. Therefore, the more advisory cases brought before the EACJ, the more the clarity and certainty in the Treaty provisions and Protocols thereto, because no integration can be fully achieved without respect of the rule of law. Thus, The EACJ has an important role in upholding the rule of law in the community, and the two advisory opinions delivered show how this court impacts and has impacted the organs and institutions of the EAC regarding harmonisation of the Community law. It cannot be emphasized enough that integration without respect for the rule of law, good governance, democracy, and human rights is

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